$90,000 ALIMONY TO MRS. STILLMAN

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testimony to a denial simply, but gave the right generally to disprove the allegations of adultery, to show that the allegation was not true, and that the defendant could not only deny but could testify to any fact or circumstances within defendant's knowledge competent and material on the question as to whether the act as charged was committed.

"In Biers vs. Biers (156 Appellate Division 409), at page 411, the learned Justice (McLennan, P. J.) said: 'This section has been held to mean that the alleged guilty party is not limited to denying specifically the charges of adultery, but may testify to any fact or circumstance within his or her knowledge, competent and material on the question as to whether the act, as charged, was committed.' (Several decisions cited). The effect of these decisions is that, in order to disprove the allegation of adultery, the party charged may testify to facts tending to deny the charges made or to prove that they were committed or connived at by the other party to the marriage, or that the offences have been forgiven and condoned.

"And, at page 413, the learned Justice said: 'It is urged by the respondent that the provisions of Section 821 are intended only to prohibit the husband or wife from testifying against the other upon the issue of adultery in an action for absolute divorce, and that if other issues are tendered by the defendant, such as connivance or condonation, either party may testify without restraint upon such issues.'

We are unable to agree with this contention. It is contrary to the plain reading of the statute, and the language of the section has been strictly applied by the courts in all cases, so far as we have been able to find. In Valentine vs. Valentine (87 Appellate Division, 156) it was held error to allow the wife to testify against her husband concerning his property and income. In Dickinson vs. Dickinson (63 Hun, 516) it was held error to permit the plaintiff to testify to the fact of her residence where jurisdictional acts were in issue.'

"While the party charged could testify to facts tending to deny the charges made, or to prove that they were procured to be committed or condoned by the other party to the marriage, or that the offences have been forgiven or condoned, the plaintiff by his testimony could not disprove it. The decision in the Biers case was overcome by an amendment to Section 831 of the code by Chapter 181, laws of 1915, as follows: 'However, if upon such trial or such hearing the parties against whom the allegation of adultery is made produces evidence tending to prove any of the defences thereto mentioned in Section 1758 of this act, the other party is competent to testify in any such defence.'

"Mr. Nichols in his work on 'New York Practice,' volume 1, page 547, said: 'The question as to whether a person incompetent to testify as a witness can make an affidavit which will be considered and the effect thereof, is of considerable interest, but no positive rule has been laid down in regard thereto in this State.' It has been held that where the testimony of the plaintiff would be incompetent, by reason of its relating to a transaction with a deceased person, the plaintiff's affidavit is not alone sufficient to support an injunction and the appointment of a receiver, and that a person serving a sentence on a conviction for felony cannot make an affidavit.

"In the case of People ex rel Lord, an insolvent debtor, was disqualified from making an affidavit to his petition for his discharge from imprisonment under the insolvent clause and Mr. Justice Lott said on pages 91 and 92: 'The disqualification is general. It extends to all cases where the declarations of the parties are to be used in judicial proceedings for the purpose of establishing or proving some fact; and it applies both to written and oral evidence.

"'It is not limited to testimony of evidence on the trial of causes between parties, but in terms applied to all matters civil or criminal. The provision is intended as a rule of evidence and as protection to the community against the peril of testimony from a person guilty of an offence implying such dereliction of moral principles, in the opinion of the Legislature, to carry with it the presumption of a total disregard to the obligations of an oath.

"'Insolvent proceedings are very important in consequences, extending in some cases to the absolute discharge of debts, and in others limiting parties in the remedies for their collection, and affidavits of the applicant are required of more or less stringency to guard against fraud and for the protection of the rights of creditors to be affected by them. There is, therefore, as much if not more reason for disqualifying a person convicted of a felony from making such an affidavit as there is to disqualify him from being a witness on trial of a cause between third persons.

"'The effect and extent of the disability created by the statute of a similar character in England was discussed and considered in re Sawyer and it was held to extend to an affidavit which had been used to show cause against a rule calling upon another party to answer certain matters, and the court ordered the affidavit to be taken off the files.'

"The affidavit must be made by a person having personal knowledge of the facts and who is legally competent to testify under oath. There are numerous methods by which these exhibits B to H may be made competent and proved, but not by the testimony of the plaintiff or by his affidavit, where objection is made thereto. The exhibits should not be considered by me upon this motion. There are many statements in the respective affidavits of plaintiff and defendant that I believe are not competent in a case of this kind. I did not consider them on this motion when I believed they violated the rule.

"The plaintiff presents with his affidavit the testimony taken at the hearings before the learned referee as to the acts and conduct of the defendant. She denies these acts and conduct in her affidavit. The trial is pending and she has not been examined. The defendant has amended her answer and charges acts and conduct upon the part of the plaintiff of similar character as charged by him against her and such acts are supported by affidavits of different persons.

"She does not seek a divorce, but pleads recrimination against the defendant as a defence. If the acts and conduct as charged against each other are sustained neither will be entitled to a decree.

"Section 1759—When divorce denied, although adultery proved.

"In either of the following cases the plaintiff is not entitled to a divorce although the adultery is established: Subdivision 4) where the plaintiff has also been guilty of adultery under such circumstances that the defendant would have been entitled if innocent to a divorce.

"If these charges are established the plaintiff and defendant will find themselves in the same position as before the commencement of the action, except that they will have had their day in court, or perhaps several days, as to matters affecting them, and this all means time, labor and the expenditure of money. The children must be maintained and the defendant must be maintained and supported in a manner corresponding to her rank and position and the fortune of her husband.

"We must look to all the circumstances of the particular case in order to award what is fair and just between the parties, for no two cases are alike. The charges against the defendant are very serious and momentous, and, if sustained, the consequences would be very serious to her future, even if she should succeed in sustaining the charges against the plaintiff. This case is of great importance to her. It is her right to make a vigorous effort to meet the proof that may be presented against her and to present her defences, not only for herself, but for the interests of her children. Aside from these considerations, there is one person in this case who is so young and innocent as not to understand what this action is all about and will not understand until he comes to an age of understanding.

"If plaintiff is successful against the child, the child will bear a stain that cannot be erased and for which he is not responsible. The plaintiff seeks to do that which he believes is his duty to himself and his children. The plaintiff having challenged the paternity of the child, the defendant comes to its protection and to the defence of its legitimacy. This is her duty if she is right in her claim. She vigorously champions the child's cause and this is expected from any mother.

"Our law in its wisdom provides for the care and protection of those who cannot protect themselves, especially infants and those of tender years. There is such an infant in this case. The infant is made a defendant and its paternity is questioned.

"The courts are charged with the duty of protecting it. In this case the infant is represented by an honored and eminent member of the bar, who will protect the infant's interests and give the best that is in him, bringing into play all the learning and ability that the law expects from one placed in such a position of trust. The interests of the defendant and of the infant in this case are to a great extent the same.

"The contest means much and no mistake should be made. It should not be permitted to be made. Litigation is expensive and troublesome, and such litigation as is anticipated in this case means the bringing of many witnesses from many places and a long and protracted trial. It should not be said that all were not heard that should have been heard. All this means money and time, labor and effort. Proper provision must be made to meet the conditions presented.

"I believe the counsel fee should be allowed in the sum of thirty-five thousand dollars ($35,000) and twelve thousand five hundred dollars ($12,500) be allowed for expenses. During the pendency of the action the defendant and the children, and this includes the infant herein attacked, must be provided for. The children, except the infant herein, are of sufficient age to determine with whom they desire to reside during the pendency of this action. Their preference should control in the circumstances as now presented.

"While the children are with the mother or in her charge she must provide for their schooling and other necessary expenses. I believe to meet the conditions the alimony should be allowed in the sum of seven thousand five hundred dollars ($7,500) per month.

"Order may be presented in accordance herewith and when signed the stay vacated and the trial proceed before the learned referee at a time and place to be agreed upon between the parties, and if the parties cannot agree the learned referee may fix the time and place."

HYLAN FIGHTS KNIGHT BILL.

Mayor Hylan wrote yesterday to the members of the Legislature urging defeat of the bill introduced by Senator Knight which would place water companies under control of the Public Service Commission. The Mayor stated that "this bill is apparently part of a general scheme to take away from the people's representatives all power over their own business and turn it over to corporations."

CITY HALL FOUNTAIN SPOUTS IN SEPTEMBER

Park Commissioner Says Statues Are Not Completed.

The erection of the new fountain in City Hall Park, which was the storm centre of numerous rumpuses in the Board of Estimate a year ago until the board at last consented to the removal of the old fountain, will not be completed before next September, Francis D. Gallatin, Manhattan Commissioner of Parks, said yesterday.

The commissioner made the statement to allay numerous criticisms he has received because the board fence around the fountain site has been allowed to remain so long as an eyesore. Mr. Gallatin said the guilt does not attach to his department, but is wholly because the group of statues forming the main decorative feature of the fountain has not been completed and will not be done before fall.

Charming Woman Hunter

CHARMS JUNGLE BEASTS

Osa Johnson with her pet ape.

BEING held prisoner for two days and a night in a tree by a trumpeting elephant is only one of many remarkable incidents in the life of Mrs. Osa Johnson, whose adventurous experiences hunting wild beasts in the jungles with her explorer husband will be interestingly told

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